MOTION FILED
FEB 20 1980

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1979
No. 79-54

CITY OF LOS ANGELES, et al.,

Petitioners,

vs.

FANCHON BLAKE, et al.,

Respondents.

CITY OF LOS ANGELES, et al.,

Petitioners,

vs.

UNITED STATES,

Respondent.

Amicus Curiae Petition for Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE LOS ANGELES POLICE PROTECTIVE LEAGUE

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TOPICAL INDEX

	PAGE
TABLE OF AUTHORITIES	iii
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE	1
STATEMENT OF JURISDICTION AND INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, A LOCAL GOVERNMENT IS NOT REQUIRED TO ALTER ITS ESTABLISHED LAW ENFORCEMENT METHODS IN ORDER TO IMPROVE THE EMPLOYMENT OPPORTUNITIES OF MINORITY GROUP INDIVIDUALS WHO ARE UNABLE TO QUALIFY UNDER EXISTING PHYSICAL SELECTION STANDARDS THAT HAVE BEEN SHOWN TO BE JOB-RELATED	10
II. THE NINTH CIRCUIT'S DECISION IN BLAKE CONFLICTS WITH EXISTING LAW AND, IF ALLOWED TO STAND, WOULD PLACE AN UNSURMOUNTABLE BURDEN ON LAW ENFORCEMENT AGENCIES TO DEMONSTRATE THE LAWFULNESS OF THEIR SELECTION PROCEDURES	14

PAGE

A. THE NINTH CIRCUIT'S DECISION IN BLAKE CONFLICTS WITH EXISTING CASE LAW 15

B. IF ALLOWED TO STAND, THE NINTH CIRCUIT'S DECISION IN BLAKE WOULD PLACE AN INSURMOUNTABLE BURDEN ON LAW ENFORCEMENT AGENCIES TO DEMONSTRATE THE LAWFULNESS OF THEIR SELECTION PROCEDURES 22

III. PURSUANT TO §518(b) OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED, THE NINTH CIRCUIT'S REVERSAL IN UNITED STATES V. CITY OF LOS ANGELES OF THE DISTRICT COURT'S ENJOINMENT OF THE TERMINATION OF FEDERAL FUNDING WAS IMPROPER 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES PAGE

Ablemarle Paper Co. v. Moody, 422 U.S. 405 (1977) 18,19

Blake v. City of Los Angeles, 595 F.2d 1367 (9th Cir. 1979) 2,3,7,10,11 14,22,23,24 25,26

Dothard v. Rawlinson, 433 U.S. 321 (1977) 20

Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) 10,11,13,20

General Electric Co. v. Gilbert, 429 U.S. 125 (1976) 20

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 15,18,21,26

International Brotherhood of Teamsters v. United States, 431 U.S. 344 (1977) 21

Kirkland v. New York Services, 520 F.2d 420 (2d Cir. 1975) 13,21

New York City Transit Authority v. Beazer, — U.S. —, 99 S. Ct. 1355 (1979) 19

United States v. City of Los Angeles, 595 F.2d 1386 (1979) 2,3,8,23

CASES	PAGE
United States v. State of New York, 475 F. Supp. 1103 (S.D.N.Y. 1979)	23
United States v. State of South Carolina, 445 F. Supp. 1094 (D.S.C. 1976) aff'd. 434 U.S. 1026 (1978)	15,16,21
Washington v. Davis, 426 U.S. 229 (1976)	17,18,19 22,24
UNITED STATES STATUTES	
Omnibus Crime Control and Safe Streets Act of 1968, §561(b), 42 U.S.C. §3766 (c)(2)(e)	8,9 28,29
Title VII of The Civil Rights Act of 1964, as Amended, 42 U.S.C. §2000(e)	
Uniform Selection Guidelines, 29 C.F.R. §1607 et seq.	14,25
RULES	
Rules of the Supreme Court, Rule 42(3)	1
TEXTBOOK	
J. Wilson, Varieties of Police Behavior (1968)	12

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MOTION OF THE LOS ANGELES POLICE PROTECTIVE LEAGUE FOR LEAVE TO FILE BRIEF AMICUS CURIAE

STATEMENT OF JURISDICTION

Pursuant to Rule 42(3) of The Rules of The Supreme Court, The Los Angeles Police Protective League respectfully moves the Court for leave to file a brief amicus curiae in the above-entitled case.

Consent to file an amicus curiae petition for a Writ of Certiorari has been granted by Mr. Neil C. Baker, Counsel for the Petitioners; however, Mr. Timothy B. Flynn, Counsel for Respondents Blake, et al., has declined to provide the requested consent.

INTEREST OF THE LOS ANGELES POLICE PROTECTIVE LEAGUE

The Los Angeles Police Protective League (hereinafter "the League") is a voluntary, fraternal organization consisting of approximately 6,600 members of the Los Angeles Police Department. The League is certified and recognized by The City of Los Angeles as the employee organization for the Los Angeles Police Department, and it represents its members in employment, disciplinary and, on occasion, legal matters.

The interest of the League in the Petition for a Writ of Certiorari submitted by the City of Los Angeles, et al., in United States of America v. City of Los Angeles and Blake v. City of Los Angeles stems from the severe impact on public and police officer safety that will occur if the Ninth Circuit's decisions are allowed to stand. In essence,

the Ninth Circuit in its decisions mandates the imposition of quota hiring of women and minorities, to the exclusion of the best qualified applicants for the entry-level police officer position. It is the League's belief that such a result will jeopardize the quality of police services provided and thereby pose a serious threat to public and police officer safety.

In light of the foregoing, it is respectfully submitted that the interest of the League's membership in the pending Petition for a Writ of Certiorari in the United States of America v. City of Los Angeles and Blake v. City of Los Angeles cases is substantial and deserves articulation by means of the accompanying brief amicus curiae. The League recognizes that a substantial time lapse exists between the date the Petition for a Writ of Certiorari was filed and the instant date of this Motion for Leave to File a Brief Amicus Curiae, but it believes that recent developments on the Circuit Court level justify the late submission. In particular, the Ninth Circuit's grant of an Injunction Pending Appeal delineating specific hiring goals for women and

blacks adds a new dimension to the City of Los Angeles' petition for a Writ of Certiorari. In essence, the Ninth Circuit's imposition of hiring goals in advance of the trial of these companion cases on their merits represents a substantial first step in the restructuring of the racial and sexual composition of the Los Angeles Police Department. Further, to the extent that the Circuit Court's grant of the Injunction Pending Appeal portends a ruling adverse to the City of Los Angeles in the forthcoming hearing of Plaintiffs' appeals from the District Court's denial of their respective Preliminary Injunction Motions scheduled for March 3, 1980, this process will be accelerated. It is the League's belief that the de facto restructuring of the racial and sexual composition of the Los Angeles Police Department prior to an adjudication of the cases on their merits represents a dangerous gamble with public and police officer safety. This is a concern not heretofore fully articulated by the parties to this action.

CONCLUSION

For the above-stated reasons, the League strongly urges this Court to grant this Motion for leave to file the accompanying brief amicus curiae in support of the City of Los Angeles' pending Petition for a Writ of Certiorari, so that the legal research as well as the opinions and conclusions of the League's membership may be considered as therein provided.

Respectfully submitted,

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& FRANSCELL

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Protective League

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BRIEF AMICUS CURIAE OF THE
LOS ANGELES POLICE PROTECTIVE LEAGUE

STATEMENT OF JURISDICTION AND INTEREST OF AMICUS CURIAE

The statement of jurisdiction and interest of Amicus Curiae are set out in the Motion for Leave to File, supra.

SUMMARY OF ARGUMENT

In requiring an employer to establish

that its selection procedures are "intimately related" to "safe and efficient job performance" to rebut a prima facie showing under Title VII, the Ninth Circuit in Blake v. City of Los Angeles adopts a standard of proof impossible for the employer to meet. In the law enforcement context, the application of the Blake v. City of Los Angeles standard would result in the abandonment of physical selection procedures designed to identify the best qualified applicant, despite the demonstrated rational relationship of such selection procedures to the job of police officer.

Indeed, to the limited extent that an employer could establish that its challenged selection procedures were "intimately related" to job performance under the Blake v. City of Los Angeles standard, the Ninth Circuit would nevertheless require the employer to abandon their use absent a showing that such selection procedures are necessary to ensure a "safe and efficient" job performance by prospective employees. One consequence of this limitation of test validation to "safe and efficient" job performance, however, is to prohibit an

employer from selecting an employee on the basis of excellent job performance. In the law enforcement context, application of this rule would require police departments to restructure established law enforcement procedures in order to accommodate the merely "adequate" job performance of new entry-level police officers. The abandonment of established law enforcement procedures tailored to individual community needs would clearly harm the public interest.

In similar fashion, the Ninth Circuit's decision in United States v. City of Los Angeles represents a threat to public and police officer safety if allowed to stand. In reversing the District Court's issuance of a preliminary injunction enjoining the termination of LEAA funding, the Ninth Circuit failed to properly interpret the clear language of §518(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended. In pertinent part, that provision proscribes the conditioning of any LEAA grant on the adoption of a "percentage ratio, quota system, or other program to achieve racial balance." The failure of the Ninth Circuit to uphold the District

Court's injunctive order on the basis of §518(b) represents an endorsement of the Justice Department's efforts to force the City of Los Angeles to adopt hiring goals or quotas for women and minorities, to the exclusion of the best qualified applicants.

ARGUMENT

I. UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1965, AS AMENDED (HEREINAFTER "TITLE VII"), A LOCAL GOVERNMENT IS NOT REQUIRED TO ALTER ITS ESTABLISHED LAW ENFORCEMENT METHODS IN ORDER TO IMPROVE THE EMPLOYMENT OPPORTUNITIES OF MINORITY GROUP INDIVIDUALS WHO ARE UNABLE TO QUALIFY UNDER EXISTING PHYSICAL SELECTION STANDARDS THAT HAVE BEEN SHOWN TO BE JOB-RELTAED

In Blake, the Ninth Circuit ruled that under Title VII a local government is required to modify its established law enforcement methods in order to improve the employment opportunities of minority group individuals who are unable to qualify under job-related physical selection standards, so long as its legitimate interest in safe and efficient police officer performance is not jeopardized. Blake v. City of Los Angeles, 595 F.2d 1367, 1383 (9th Cir. 1979).

However, in adopting such a hiring rule, the Ninth Circuit's decision directly conflicts with this Court's Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978) ruling. In Furnco Construction Corp., this Court was faced

with a situation where the employer had successfully rebutted a prima facie showing by minority job applicants under Title VII, but the Court of Appeals nevertheless imposed a "corrective" hiring regimen intended to increase the number of minority job applicants that the employer considered. Id. at 574. In reversing the Circuit Court's holding, this Court stated that Title VII "does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees" until at least a violation of Title VII has been established. Id. at 577-78.

In reviewing decisions like the Circuit Court's in Furnco Construction Corp. and the Ninth Circuit's in Blake, it is important to recall that the primary purpose underlying Title VII is to ensure that employment decisions are made only on the basis of merit, without regard to race, religion, color, sex or national background. Once the employer rebuts a prima facie showing under Title VII by demonstrating that its selection procedure is job-related, then the employer's established procedure should not be subject to judicial reform, since

it more likely than not is based on merit considerations. To rule otherwise, in the law enforcement context, would operate to deprive police departments of the flexibility needed to tailor their services to the demands of the particular communities they serve. See J. Wilson, Varities of Police Behavior (1968).

To this end, it is important to recognize that the imposition of a hiring goal on the City of Los Angeles in the Ninth Circuit's recent issuance of an Injunction Pending Appeal conflicts with the City of Los Angeles' established system of civil service merit selection. As noted by the Second Circuit, civil service merit selection does not operate as a pretext for racism:

> "Civil Service laws, like civil rights laws, were enacted to ameliorate a social evil. In the former case, it was the spoils system; in the latter, discrimination.... It seems to us that the judiciary should act with great reluctance in undermining traditional civil service concepts and if a decision is to be made to subordinate the social purposes of civil service to those of equal employment opportunity, that decision should be made by the people, speaking through

their legislators." Kirkland v. N.Y. State Department of Correctional Services, 520 F.2d 420, 428-29 (2nd Cir. 1975), Certiorari denied, 429 U.S. 823 (1976).

Absent a showing that the City of Los Angeles' selection procedures for the entry-level police officer position are not job-related and therefore violative of Title VII, it appears proper to conclude that its established procedures are protected from judicial reform. Certainly, the Circuit Court's imposition of a hiring goal by way of its recent issuance of an Injunction Pending Appeal contravenes this Court's ruling in Furnco Construction Corporation v. Waters, supra. Further, to the extent that the Ninth Circuit's grant of the Injunction Pending Appeal portends a ruling adverse to the City of Los Angeles in the forthcoming March 3, 1980 hearing of Plaintiffs' appeals from the District Court's denial of their respective preliminary injunction motions, this situation will be exacerbated.

II. THE NINTH CIRCUIT'S DECISION IN BLAKE CONFLICTS WITH EXISTING LAW AND, IF ALLOWED TO STAND, WOULD PLACE AN INSURMOUNTABLE BURDEN ON LAW ENFORCEMENT AGENCIES TO DEMONSTRATE THE LAWFULNESS OF THEIR SELECTION PROCEDURES

Under the Blake holding, an employer is required to establish that its selection procedures are "intimately related" to job performance to rebut a prima facie showing under Title VII in a testing case. Blake v. City of Los Angeles, supra, at 1381. In order to satisfy this job-relatedness standard, the Ninth Circuit mandates that the employer must submit a formal validation study that strictly complies with the EEOC Guidelines (29 C.F.R. §1607 et seq.)[1/] or be subject to an otherwise "[much heavier] burden of justification." Id at 1379. Further,

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1/ Subsequent to the filing of the companion actions, the EEOC Guidelines were superseded by the Uniform Guidelines on Employee Selection Procedures, 43 Fed. Reg. 38290 (Aug. 25, 1978). For the purpose of this brief, reference to the EEOC Guidelines is inclusive of the successor Uniform Guidelines.

the Ninth Circuit intimates that the "predictive" validation procedure is required to the exclusion of the other validation procedures specified in the Guidelines. Id. at 1379-1382.

A. THE NINTH CIRCUIT'S DECISION IN BLAKE CONFLICTS WITH EXISTING CASE LAW

The adoption of an "intimately related" standard by the Ninth Circuit directly conflicts with this Court's holding in Griggs v. Duke Power Company, 401 U.S. 424 (1971). Faced with an employee's hiring requirement that job applicants and transferees, inter alia, pass a standardized general intelligence test, this Court held that the employer was required to prove that the test was "demonstrably a reasonable measure of job performance" to justify the test's discriminatory effect. Id at 424 (emphasis added).

In addition, the "intimately related" standard conflicts with a major decision of a three-judge District Court in United States v. State of South Carolina, 445 F. Supp. 1084 (D.S.C. 1976), affirmed by this Court, 434 U.S. 1026 (1978). In pertinent part, the three-judge panal concluded:

> "We think that Griggs did not impart into Title VII law the concept of compelling interest' developed as a part of the 'strict scrutiny' standard for assessing certain classifications under the Fourteenth Amendment. Under this concept, the Court would balance disparate impact against [minority groups protected under Title VII] against the purpose of the employer and uphold the business practice only if it were sufficiently 'compelling' to overcome the disparate impact." 445 F. Supp. at 1115 (emphasis added).

In light of the foregoing reasoned conclusion of the three-judge panal in United States v. State of South Carolina, it is clear that the proper test to apply in judging the validity of a selection procedure is whether it is a demonstrably reasonable measure of the job, as opposed to a "compelling interest", "strict scrutiny", or "intimately related" test.

In similar fashion, the Ninth Circuit's mandate that an employer must submit a formal validation study that strictly complies with the EEOC Guidelines is erroneous. Such a conclusion is supported by a review of relevant case law addressing the issue. With respect to the decisions of this Court,

it was noted in Washington v. Davis, 426 U.S. 229, 247, footnote 13:

> "It appears beyond doubt by now that there is no single method for appropriately validating employment tests for their relationship to job-performance."

In Washington v. Davis, supra, this Court addressed the validity of a written test for verbal skills administered to applicants for police officer positions, which had a disproportionate impact on blacks. In discussing the validity of the selection procedure in a Title VII context, this Court held that the District Court's grant of summary judgment for defendants was proper on the basis that "a positive relationship between test and training course performance was sufficient to validate the [test]," despite the fact that the (1970) EEOC Guidelines did not expressly permit validation by correlation to training performance. Id. at 249. In reaching such a result, this Court noted that it "seems to us the much more sensible construction of the job-relatedness requirement," Id at 251.

The Washington v. Davis decision is noteworthy because it constitutes the

first instance in which this Court focused on the requisites for an employer to successfully establish job-relatedness. In two earlier decisions, this Court wrestled with the concept of job-relatedness, but in the context of situations where the defendant employer did not present validation evidence which under any reasonable standard demonstrated the job-relatedness of its challenged selection procedures. Griggs v. Duke Power Co., supra, at 431 [The requirements in issue did not bear a demonstrable relationship to successful performance of the jobs "and were adopted without meaningful study of their relationship to job-performance ability"]; Ablemarle Paper Co. v. Moody, 422 U.S. 405 (1975) [The challenged testing was implemented without analysis of the particular skills of the jobs involved or evidence of significant correlation between test results and job performance.] Accordingly, this Court's decision in Washington v. Davis represents the authoritative pronouncement on the subject of job-relatedness, and it does not constitute a departure

from this Court's earlier decisions.[2/]

In this Court's pronouncements on employment selection procedures following Washington v. Davis, there is no suggestion that an employer must validate its selection procedures through strict compliance with the EEOC Guidelines, or face an otherwise heavier burden of justification. See, e.g., New York City Transit Authority v. Beazer, — U.S. —, 99 S.Ct. 1355 (1979) [The employment

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[2/] In viewing Ablemarle Paper Co. v. Moody, it is important to note that this Court, in evaluating the employer's testing program under specific provisions of the Guidelines, did not state whether it was necessary that an acceptable validation must adhere to all the technical provisions of the Guidelines. Further, it should be recognized that the majority opinion departed from the Guidelines on the important issue of which party shoulders the burden of demonstrating the availability of suitable alternatives which would have a lesser discriminatory impact, in the event the employer demonstrates the business necessity of its selection procedures. Contrast Ablemarle Paper Co. v. Moody, supra, at 425 and 436, with 29 C.F.R. §1607.3(b). In sum, it appears that this Court in Ablemarle Paper Co. did not mandate slavish adherence to the EEOC Guidelines.

exclusion of individuals receiving methadone treatment upheld as "job related" without any discussion of formal validation evidence]; Furnco Construction Co. v. Waters, supra, [upheld employer's practice of hiring only experienced and highly qualified bricklayers, without discussing whether employer required to validate its selection procedures pursuant to the EEOC Guidelines]; and Dothard v. Rawlinson, 433 U.S. 321 (1977) [upheld finding that height and weight requirements for position of prison guard was not demonstrated to be job-related where no evidence introduced to support this contention]. Further, in other contexts, this Court has declined to accord the EEOC Guidelines controlling weight. See General Electric Co. v. Gilbert, 429 U.S. 125, 140-145 (1976) [exclusion of pregnancy-related disabilities under employer's disability benefits plan upheld despite provision of EEOC Guidelines requiring coverage]. The apparent refusal of this Court to require an employer to slavishly adhere to the EEOC Guidelines in establishing the job-relatedness of its selection procedures is supported by Appellate decisions in the Second, Fifth, Seventh,

Eighth and Tenth Circuits.[3] In addition, a three-judge panal in United States v. State of South Carolina, supra, supports the conclusion that the EEOC Guidelines are, as their title suggests, guides rather than absolute proscriptions. [In United States v. State of South Carolina, the three-judge panal accepted as evidence a validation study presented by the employer, despite its methodological deficiencies as measured by the EEOC Guidelines].

In sum, a review of the relevant case law establishes that validation evidence should be treated like any other evidence. Int'l Brotherhood of Teamsters v. United States, 431 U.S. 344 (1977). Admittedly, a body of Circuit and District Court decisions exists which interprets the general endorsement of the 1970 Guidelines in Griggs v. Duke Power Co. to require virtually literal compliance with the Guidelines by the employer to establish job-relatedness. See, e.g., Kirkland v. State Dept. of Correctional

[3] These decisions are discussed in the City of Los Angeles' Petition for a Writ of Certiorari, pp. 22-23, footnote 19.

Serv., supra. In large part, however, these decisions occurred before this Court's authoritative Washington v. Davis decision. To the extent, however, that Appellate and District Court decisions subsequent to Washington v. Davis support the Ninth Circuit's endorsement of literal compliance with the EEOC Guidelines in its Blake ruling, a resolution of the jurisdictional conflict by this Court is necessary.

B. IF ALLOWED TO STAND, THE NINTH CIRCUIT'S DECISION IN BLAKE WOULD PLACE AN INSURMOUNTABLE BURDEN ON LAW ENFORCEMENT AGENCIES TO DEMONSTRATE THE LAWFULNESS OF THEIR SELECTION PROCEDURES

If allowed to stand, the Ninth Circuit's mandate in Blake that an employer must submit a formal validation study that strictly complies with the rigid technical requirements of the EEOC Guidelines to demonstrate the job-relatedness of its challenged selection procedures will result in the abandonment in this Circuit of all selective testing procedures that adversely impact any one group protected under Title VII. Instead, employers will primarily utilize hiring

ratios of minority, female and caucasian male employees, without regard to relative qualifications.

This conclusion that an employer will utilize hiring ratios in situations where its existing selection procedures adversely impact a racial or sex group is supported by the consideration that the employer faces tremendous back pay liability and attorney fee costs in Title VII litigation. In addition, the expense of validating selection procedures pursuant to the EEOC Guidelines is extreme and often prohibitive. See United States v. State of New York, 475 F. Supp.1103 (S.D. N.Y. 1979 [Content validation study, very expensive and performed with the assistance of The United States Civil Service Commission, found deficient]. And, in the law enforcement context, the defendant employer risks the termination of its federal funding if its selection procedures are challenged, as illustrated by the instant United States v. City of Los Angeles litigation.

Aside from the obvious economic compulsion on employers to adopt hiring quotas under the Blake decision, it is

important to note that test validation pursuant to the technical requirements of the EEOC Guidelines is often practically or technically impossible. Indeed, in those jurisdictions where the courts only accept criterion-related studies as evidence of compliance with the EEOC Guidelines, the incidence of validation studies that passed judicial scrutiny is extremely low. 4/

With respect to the Blake decision, it appears that the Ninth Circuit adopts the position that it will only accept "predictive" validation studies as evidence of the job-relatedness of challenged selection procedures, as evidenced by its assertion that the City of Los Angeles' exacting validation studies "[were] of little value" because they did not include individuals excluded by the selection

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4/ See Deposition of William H. Enneis, attached as Exhibit B to the Amicus Brief of the Executive Committee of the Division of Industrial Organizational (Division 14) of The American Psychological Association, filed with the Supreme Court in Washington v. David, supra.

standards in question. Blake v. City of Los Angeles, supra, at 1380. This limitation of validation evidence to only "predictive" studies, however, contravenes the EEOC Guidelines themselves,[5/] and is of questionable wisdom in situations where the adverse consequences of employing unqualified individuals for testing purposes could be severe. To this end, the position of entry-level police officer is a prime example of a job where the potential of harm resulting from employment of unqualified individuals precludes the implementation of a "predictive" study.

Independent of the above-stated safety considerations, the Ninth Circuit's mandate in Blake that an employer must hire unqualified individuals to test the validity of its selection procedures overlooks the practicalities of civil service laws in the sphere of public employment. Once individuals are hired by

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5/ See 29 C.F.R. §1607.5. The EEOC Guidelines do not express any preference between the "predictive" and "concurrent" validation techniques.

a public employer, they typically acquire a vested right to their employment position. Accordingly, it is unclear whether a state or municipal employer would ever undertake a "predictive" validation study, since the unqualified individuals hired for the purpose of testing the challenged selection procedures could not be discharged following conclusion of the study.

In light of the above-illustrated myriad of difficulties that would confront an employer in conducting a validation test pursuant to the Blake standards, it appears proper to conclude that employers would follow the path of least resistence and adopt hiring quotas in those situations where their existing selection procedures have an adverse impact on any group protected under Title VII. Such a result, however, is in stark contrast to the purpose underlying the enactment of Title VII, as recognized by this Court in Griggs v. Duke Power Co., supra, at 434, citing to a memorandum of Senators Case of New Jersey and Clark of Pennsylvania, managers of the bill on the Senate floor:

> "[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color."

The above-quoted language exemplifies that Title VII was enacted to ensure equal opportunity, as opposed to requiring affirmative action, in hiring by employers. This Court's review of the Blake decision is necessary to preserve this fundamental distinction.

III. PURSUANT TO §518(b) OF THE OMNIBUS CRIME CONTROL AND SAFE STREETS ACT OF 1968, AS AMENDED, THE NINTH CIRCUIT'S REVERSAL IN UNITED STATES V. CITY OF LOS ANGELES OF THE DISTRICT COURT'S ENJOINMENT OF THE TERMINATION OF FEDERAL FUNDING WAS IMPROPER

The failure of the Ninth Circuit to uphold the District Court's injunctive order represents an endorsement of the Justice Department's efforts to force the City of Los Angeles to adopt hiring goals or quotas for women and minorities regardless of the effect on public and police officer safety. It is the League's belief that the imposition of hiring quotas on the Los Angeles Police Department will result in the abandonment of law enforcement policies and procedures tailored to the demands of the community it serves.

The League urges this Court to review the Ninth Circuit's decision in light of §518(b) of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, (42 U.S.C. §3766(c)(2)(e)). §518(b) proscribes the conditioning of any LEAA grant on the

adoption of a "percentage ratio, quota system, or other program to achieve racial balance." It is the League's position that the clear language of §518(b) proscribes the Justice Department's attempt to condition LEAA funding on the adoption of racial and sex quotas by the City of Los Angeles and, accordingly, that the Ninth Circuit's reversal of the District Court's order enjoining the termination of such funding was improper.

CONCLUSION

Essentially, the basic thrust of the Ninth Circuit's decisions in Blake v. City of Los Angeles and United States v. City of Los Angeles is to force employers to abandon all selection standards which might adversely affect any racial or sex group on a statistical basis. To accomplish this end, the Ninth Circuit adopts stringent validation requirements that impose unrealistic demands on employers to justify the necessity for their selection procedures.

The Ninth Circuit's adoption of such stringent validation requirements, however, conflicts with the decisions of this Court. Further, common sense dictates that the application of stringent validation requirements is inappropriate in the law enforcement context, where the high degree of harm to public safety that would result from the hiring of unqualified entry-level officers should lessen any corresponding need to demonstrate the job-relatedness of the challenged selection procedures.

The substantial reasons favoring this Court's review of the Blake v. City

of Los Angeles and United States v. City of Los Angeles decisions are heightened by the Ninth Circuit's imposition of hiring goals on the City of Los Angeles by injunctive order. It is the League's belief that the de facto restructuring of the Los Angeles Police Department occasioned by such an injunctive order contravenes the concept of local law enforcement control and may well threaten the quality of police services provided to the Los Angeles community.

For all the foregoing reasons, the League respectfully submits that a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit in the Blake v. City of Los Angeles and United States v. City of Los Angeles cases.

Respectfully submitted,

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